NO. 43232-3

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

MERRY WOECK, APPELLANT

v.

DOUGLAS WOECK, RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable Ronald L. Culpepper

No. 11-3-03031-7

BRIEF OF RESPONDENT

TUELL & YOUNG, P.S.

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly find the separation agreement was fair at the time it was entered when both parties were fully aware of the nature and extend of the martial assets, both parties consulted with independent counsel and the wife is a lawyer specializing in family law?

2. Did the Court properly follow RCW 26.06.0070 when it accepted the agreement of the parties thereby not exercising its discretion to value and distribute property?

3. Did the trial court properly deny Merry's motion when there was no evidence in the record to support a claim of duress?

4. Should the court deny an award of attorney fees when Merry failed to provide sufficient legal briefing to grant said request?

B. STATEMENT OF THE CASE.

1. Procedure

The parties were married on October 29, 2001, and separated on June 25, 2011. CP 263-268. Merry[1] filed for dissolution on August 11,

[1] For clarity, respondent will refer to the parties by their first names. No disrespect is intended.

2011. CP 93-96. On February 14, 2012, Doug moved the Superior Court to enter final orders consistent with the CR 2(a) agreement signed by the parties. CP 196-212.

Merry challenged entry of the final orders and filed a cross-motion seeking to have the CR2(a) agreement invalidated by the Court. CP 217-223, 224-248. The basis for her request was based on her argument that Doug breached the CR 2 (a) agreement by engaging in subsequent acts of domestic violence, the agreement was void because she entered it under severe emotional distress and that Doug failed to comply with the terms of the agreement. CP 217-223.

The Court granted Doug's motion to enforce the CR 2(a) agreement, denied Merry's motion to set aside the CR 2(a) agreement and entered final orders. CP 259, 260-262, 263-268, 269-275.

Merry filed a timely notice of appeal. CP 278-308.

2. Facts

Doug and Merry married on October 29, 2001, and separated for the last time on June 25, 2011. CP 196. The parties have no children. Id.

Merry is an attorney licensed to practice in the State of Washington. CP 200. She has been in practice since 2002, having passed the bar in the fall of 2001. Id. Her practice focuses on criminal defense, family law, estate planning, contracts, real estate and employment matters. CP 202-203. Merry advertises on her web site that she is an "experienced

attorney" in the area of family law. Id.

Doug is a longshoreman with no legal training. CP 197. Doug did assist Merry in her law practice from time to time, but it was limited to non-legal matter such as technology or scheduling issues. Id.

The August 2011 petition for divorce was not the first time the parties' contemplated ending their marriage. Id. In 2008 the parties reached an agreement and filed for divorce. CP 197, 204-2011. Merry prepared all of the documents for signing. Id. The 2008 petition and subsequent amended petition do not differ widely the CR2A Agreement at issue now. Id. Ultimately the parties reconciled and dismissed the petition by agreement. CP 197.

Both parties realized by Spring 2011 their marriage was failing. Id. Sometime around May, Merry obtained an apartment of her own. Id. She borrowed money from her Grandfather to consult with or retain a lawyer. Id.

Merry told Doug she met with an attorney. Id., CP 224. In late July or early August 2011, Merry prepared and presented Doug with a proposed petition for dissolution of marriage, a proposed separation contract and CR2A Agreement and a proposed agreed temporary order. Id.

Doug met with an attorney and subsequently proposed several changes to Merry's proposed documents. Id. The parties discussed the changes directly, and used Doug's father as a go-between when their

communication was ineffective. CP 198. Merry told Doug she wanted to consult with her attorney again. Id. She then agreed to some of the changes Doug requested and they ultimately reached an agreement as to all terms of their divorce. Id. CP 225.

Based on their discussions with each other and their respective counsel, Merry revised the petition, CR2A agreement and temporary order to reflect their agreements. Id., CP 225. Both parties signed the documents and Merry filed them with the court. Id.

Doug met with his attorney one time prior to signing the joinder, CR2A agreement and agreed temporary order. Id. Doug does not know how many times Merry consulted with her attorney, but based on her representations to Doug, he believes it to be more than twice. Id.

At no time did Doug pressure Merry to sign the CR2A agreement. Id. At no time did Doug pressure Merry about the divorce. Id. Merry drove the divorce process. Id.

Doug believes the agreement is fair on its face and that the parties were equitable to each other. Id.

In the fall of 2011, during the 90-day waiting period, Merry filed a petition for order of protection—anti harassment against Doug. Id., CP 335-338. While that was pending, in January, she filed a petition for order of protection—domestic violence Doug. Id. The anti harassment order was dismissed and an ex parte order entered in this dissolution action. Id,

CP 430.

Doug and Merry divided their assets and debts in a fair and equitable manner. CP 199. Doug agreed to file a joint 2011 federal income tax return with Merry even though he knew she had not paid sufficient taxes on her income. Id. He agreed to pay her some maintenance. Id. He agreed to help her move from his home. CP 199.

Merry had financial assistance from her grandfather to hire an attorney to assist her with the dissolution process. CP 224.

Merry consulted with an attorney while the parties were negotiating the terms of their dissolution. Id.

Merry drafted the CR 2 (a) agreement. CP 225.

Merry selected the CR 2 (a) agreement as the means to ensure Doug did not back out of their agreement, knowing that it was binding on both parties. Id.

Domestic Violence

In 2003 Doug was charged with 4th degree domestic violence for "head butting" Merry during an argument. CP 495. He entered into a Stipulated Order of Continuance for Domestic Violence. CP 495, 499. He completed an anger management class as well as a victim impact panel. CP 495, 503-504. He completed the terms of his agreement July 15, 2004 and the court dismissed his assault charge. CP 495, 508.

Doug has at all times denied any and all alleged acts of domestic

violence against Merry. CP 495.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY ENFORCED THE CR 2(a) AGREEMENT.

Trial courts have broad discretion in the distribution of property and liabilities in marriage dissolution proceedings. Brewer v. Brewer, 137 Wash.2d 756, 769, 976 P.2d 102 (1999). Settlement agreements are governed by general principles of contract law. Lavigne v. Green, 106 Wn.App. 12, 20, 23 P.3d 515 (2001). The legal effect of a contract is a question of law that Courts of Appeal review de novo. Yeats v. Estate of Yeats, 90 Wn.2d 201, 204, 580 P.2d 617 (1978).

RCW 26.09.070 was adopted to depart from the former rule that allowed a judge to give just slight deference to separation agreements between divorcing parties. In re Marriage of Shaffer, 47 Wn.App. 189, 733 P.2d 1013 (1987). RCW 26.09.070 gives marital partners more freedom to divide their property by reducing the power of the court to disregard their agreement. See Id. at 193, 733 P.2d 1013.

Under RCW 26.09.070 (3), "amicable agreements are preferred to adversarial resolution of property ... questions," and the separation contract is, therefore, binding on the parties unless the trial court finds it "unfair" at the time of execution. Little v. Little, 96 Wash.2d 183, 193,

634 P.2d 498 (1981). RCW 26.09.070 (3) "gives even wider latitude to marital partners to independently dispose of their property by contract, free from court supervision," Nelson v. Collier, 85 Wn.2d 602, 610, 537 P.2d 765 (1975).

Washington courts evaluate the fairness of a separation agreement at the time of its execution, applying a two prong test. In re Marriage of Hadley, 88 Wn.2d 649, 654, 565 P.2d 790 (1977). The Court looks at "(1) whether full disclosure has been made by respondent of the amount, character and value of the property involved, and (2) whether the agreement was entered into fully and voluntarily on independent advice and with full knowledge by the spouse of her rights." In re Marriage of Cohn[2], 18 Wn.App. 502, 506, 569 P.2d 79 (1977) (quoting Hadley, 88 Wn.2d at 654)).

i. The trial court was not required to value the property.

Merry argues that this matter should be remanded so the trial court can value the marital property. This argument is without merit. Under RCW 26.09.070 (3), the trial court's authority to determine the division of marital property when the parties have entered into a separation agreement

[2] Cohn deals with an antenuptual agreement, not a property settlement agreement. But the Court has consistently applied the Cohn test and the rationale of RCW 26.09.070 to both prenuptial agreements and property settlement agreements between spouses. See In re Marriage of Shaffer, 47 Wn.App. 189, 194 n. 1, 733 P.2d 1013 (1987).

is extremely limited. While Merry cites case law indicating that value is a material fact, etcetera, that is true *when the parties go to trial,* not when they reach an agreement. As cited above, the only real question before the trial court when the parties reach an agreement regarding the disposition of their property, is whether the agreement is fair. Because the agreement here was fair (see argument below), the trial court did not err when it failed to value the parties' property.

ii. There was full disclosure of the amount, character and value of property involved.

Here, Merry claims that because Doug failed to value his retirement and 401 (k), the agreement is unenforceable. Merry had as much access, if not more than Doug did to Doug's pension and 401 (k) information. CP 254. More importantly, as an attorney who specializes in family law, she has skills and knowledge most pro se litigations do not have. Specifically, she knew she could have sent a subpoena directly to the pension and 401 (k) administrators asking for the value of Doug's accounts.

The appellant in Cohn made a similar argument, stating that she did not know the exact values of the property included in the settlement agreement. 18 Wn.App. at 508. However, the Cohn court found that because the financial statements were sent to the family residence and were available for her to read, she "reasonably should have had such knowledge" the asset values. Cohn, 18 Wn.App. at 508.

The Cohn court noted that the underlying rationale of this test is to avoid deliberate concealment of property values. Thus, *because there was no showing of concealment*, the Cohn Court held that disclosure regarding the property was adequate. 18 Wn.App. at 507-08 (citing Friedlander v. Friedlander, 80 Wn.2d 293, 300, 494 P.2d 208 (1972)) (emphasis added).

Here, Merry has made no showing that Doug deliberately concealed any information from her. In fact, Merry was the party that provided Doug's pension statements to the trial court establishing her knowledge of the account and ability to obtain the information. CP 24-35.

There is no evidence in the record to establish that Merry could not have obtained specific value information had she requested. In fact, the CR 2 (a) agreement makes it clear that she had a very good idea of the parties' financial status. CP 3-7. The CR 2 (a) agreement states at paragraph B, that the value of Doug's home is "underwater". CP 4.

At paragraph B (2), the parties' condo in Mexico is identified, including when it was purchased and the on-going monthly payment. CP 5.

At paragraph D, Doug's gun trust is identified, valued and allocated. Id.

At paragraph G, the household fixtures, appliances and electronics are identified. Id. The property is allocated between the parties, including a requirement that Doug purchase Merry new speakers, or pay her

$200.00. Id. It is clear the parties' considered the value of the property that was being distributed, and assigned value to that property as evidence by the requirement Doug reimburse Merry $200.00 for new speakers.

At paragraph H, the debts of the parties are detailed and allocated. Id. Again, this allocation evidences the parties were both well aware of the nature and extent of marital property.

At paragraph J, Doug's pension and 401(k) benefits are addressed. Id. Specifically, the parties agreed Merry would receive $5000 from Doug's 401(k), he would pay her $1400.00 in moving expenses as well as $300 a month for 12 months. CP 7. Merry's total compensation is $10,000.00. Id. This provision also required Doug to leave Merry on his health insurance until a final decreed was entered, which was also specified in the agreement. Id.

The parties' signed the CR 2(a) agreement on August 11, 2011. Merry filed with the trial court Doug's paystubs dated 7/1/11, 7/15/11, 7/22/11 and 7/29/11. CP 25-29. She filed information relating to Doug's 401(k), which included contact information for reaching the administrator dated July 9, 2009 for information through June 2010. CP 30-31. She filed a notice regarding Doug's permitted vacation time. CP 33. She also filed his pension statement, which indicates it was prepared in April 2011. CP 35. *All of these documents contain the parties' home as the mailing address and all of these documents were in Merry's possession and dated*

prior to the date the separation agreement was signed.

Merry knew full well the nature and extend of the parties' property, and the failure to have an account or asset valued, is not proof that she was ignorant of its value. Her argument fails.

iii. Merry entered into the agreement fully and voluntarily on independent advice and with full knowledge of her rights.

In Cohn the spouses executed a prenuptial agreement and a settlement agreement. 18 Wn.App. at 503, 569 P.2d 79. Later the wife challenged the enforceability of both agreements "on the grounds that [she] did not sign them on independent advice and with full knowledge of her rights, and that a full disclosure had not been made to her of the amount, character and value of the property involved." Id.

Rejecting the wife's challenge, the court observed the spouses had discussed the prenuptial agreement months prior to their wedding, and "[a]lthough [the wife] testified that she felt rushed into signing the agreement, ... *she did not at any point indicate to the lawyer who had drafted it that she felt she was being rushed or that she was signing anything that she did not fully intend to sign.*" Id. at 506, 569 P.2d 79 (emphasis added).

The court reasoned if the wife did not understand the

provisions or effect of the agreements "there [was] no evidence that she ever let her husband or the attorney know of her lack of knowledge .... [I]t would be unfair to penalize [the husband] for [the wife's] omission to request further information." Id. at 510, 569 P.2d 79 (citing Hadley, 88 Wash.2d at 654).

Here, Merry affirmed and reaffirmed her desire to enter final orders incorporating the terms of the agreement as late as February 6, 2012. CP 246-247. It was not until Doug refused to agree to put off the dissolution any longer that Merry began to claim she was under duress. Id. The motion seeking to enforce the terms of the agreement was filed February 14, 2012, eight days after the February 6, 2012 email where Merry again states she wants the final orders entered.

Here Merry not only is an experienced attorney who practices family law, but she also obtained independent advice from independent counsel while the parties were negotiating their separation agreement. Further, she drafted *all* of the pleadings and the agreement the parties reached in 2011 is substantially similar to the agreement they reached in 2008, the first time they filed. *AT NO TIME DID MERRY INDICATE SHE DID NOT WANT TO SIGN THE AGREEMENT.* In fact, the attorney she retained, Ms.

April, told her not to sign the agreement and she did it anyway. CP 224-225.

There is no mention in the Petition for Dissolution, drafted by Merry, of domestic violence. CP 269-275. There is no mention of domestic violence in the CR 2 (a) agreement signed by the parties. CP 3-7.

Merry made no mention in her November 2011 Petition for Protection that she filed that she was under duress at the time she signed the CR 2(a) agreement. CP 335-338. In her petition, Merry mentions a litany of allegations against Doug, none of which are corroborated. Id. However, in stark contrast to the picture Merry paints of Doug, are a series of text messages between the parties. CP 351-423. These text messages show conversations between two equals, who still clearly care for each other a great deal. There is no evidence of domestic violence, of coercion, or of power and control so common with domestic violence relationships.

Merry filed her petition on November 29, 2011, and the text messages filed by Doug cover a period from November 6, 2011 to November 28, 2011, the day before Merry filed her petition. The text messages demonstrate the contact between Doug and Merry was not only welcomed by Merry but often initiated by

her.

Notably, in a November 20, 2011 text, Merry tells Doug, "Your behavior is forcing my hand." CP 418. Finally, On November 28, 2011, *the day before she files her petition,* Doug asks Merry to call him because "he just talked to the attorney. Please call me if you are not busy. It's about health care coverage and finalization" The following day she filed her petition seeking an anti-harassment order.

There is nothing threatening, coercive, or abusive in the text messages between Doug and Merry. Merry provided no evidence that Doug made any of the statements she alleged, despite stating Doug was calling and texting her incessantly.

Doug has at all times denied (other than the 2003 incident) that he had ever engaged in acts of domestic violence against Merry. CP 495.

Nonetheless, Merry argues she was under duress at the time she signed the agreement, based on a history of domestic violence and therefore the agreement should be void. This argument is without merit.

Merry contends that "Ten years of physical, mental, emotional and financial abuse had taught Merry that [Doug] was a

very real threat to her safety and security." Br. Of Appellant at page 23. Yet, throughout the month of November 2011, she continued, *often at her insistence*, a physical and emotional relationship with Doug, even though she was no longer living with him, and they had already signed the CR 2(a) agreement.

There are far too many allegations made by Merry that are not supported by the record, in fact, nearly every assertion is unsupported, or supported by self-serving declarations drafted by Merry *after* Doug refused to agree to extend entry of the decree of dissolution.

Merry claims that she "lived with her abuser" and she "needed what little money he would give her to move out five days later." Br. Of Appellant at page 27. Yet she told the trial court she remained in the home because her apartment was not ready and she wanted to enjoy her last summer with Doug's son. CP 224.

Merry has provided to the Court a law review article regarding domestic violence. Throughout the article, the author discusses the need and importance of expert testimony to establish the presence of any of the conditions caused by domestic violence described in her article. She states, "In sum, ***expert testimony and social science theories*** have increasingly been utilized to counter

some of the stereotypes, myths and assumptions which have made it impossible for battered women to receive a fair hearing in many kinds of cases." Joan S. Meier, Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice 21 Hofstra L. Rev. 1295, 1321 (1992-1993) (emphasis added).

The author made multiple statements throughout her article highlighting the importance of expert testimony to aid the fact-finder in making a determination regarding the affects, *if any*, of the domestic violence:

> Conversely, lawyers representing battered women in both civil and criminal cases **often need to consult with psychological experts, as expert witnesses or court examiners in their cases**, or to obtain assistance for the client or her children. Id. at 1297.
>
> Thus, whereas in the past, women's killing of their abusers had typically only been legally defended as a form of "insanity," **expert testimony about the "syndrome" now offered the opportunity to tell the woman's story** in such a way that the jury would understand that the killing was "reasonable" self-defense, because it would show that the woman understandably believed she had to kill to save herself. Id. at 1305.
>
> As a result, many women continue to be convicted of murder and manslaughter for killing the person who repeatedly brutally attacked and promised to kill them **because either expert testimony is excluded or it is admitted but turned against the victim** when she deviates from the image of the perfect victim. Id. at 1307.

> The pervasiveness of this stubborn resistance to the reality of victimization of women by violent male partners means that, to address their analysis to the real social context **it is critical for social science experts who seek to help battered women's stories be accurately heard in court** which makes repeated battering possible. Id. at 1312.
>
> Since this case, like most battered women's cases was cast as a credibility battle, **this expert testimony which directly related to credibility was potentially key**. Id. at 1313.
>
> In short, cases that do not fit the stereotype (as most do not) **can still benefit from the expert assessment**. Id. at 1316. **For use in court by an expert,** Stark suggests a checklist of factors identified by Angela Brown and others, charting the nature and severity of the violence, intimidation, coercion, isolation, threats and other means of control. Id. at 1319.
>
> Of course, the importance of social science knowledge to domestic violence cases **means that expert witnesses can be critical**. Id. at 1330.

Preliminarily, it is important to know this article was published in 1992-1993, nearly 20 years ago. Certainly, the identification and acknowledgement of domestic violence has come a long way since this article was published.

In any event, here, Merry has submitted no evidence that domestic violence affected her ability to negotiate and sign the CR2(a) agreement of her own free will. She has provided no evidence she suffers from PTSD other than her self-serving

statements. She did not offer any expert testimony to the trial court in an attempt to establish duress, or to establish domestic violence, if any, affected her ability to negotiate and agree to the terms of the CR2(a) agreement. She did not file under seal with the trial court any medical records to substantiate her claims of duress or PTSD.

In her declaration to the trial court in response to Respondent's motion to enforce the CR2(a) agreement, she dedicated only a half a page to her allegation of duress.

Merry has provided no evidence ***in the record*** to substantiate that she was under duress at the time the agreement was executed. She wants the Court to be shocked and concerned by the generalizations in the article without having provided any proof that they exist in this case.

Merry continues to represent herself. If this Court grants her request to nullify the CR2(a) agreement, under what circumstances would it be valid? She met with two attorneys and was represented by one during the course of the negotiations. She is, herself, an attorney who specializes in Family and Criminal Law. She attended a CLE on drafting CR2(a) agreements and Property Settlement Agreements. There are no additional circumstances that could have been present at the time the current

CR2(a) was negotiated and signed that this drafter can imagine that would have made this agreement more procedurally and substantively fair. This calls into question these parties' ability to contract to divide their debts and assets in the future in the event this Court invalidates the CR2(a) agreement.

2. ATTORNEY FEES

i. Merry's request for fees should be denied.

RAP 18.1 states in relevant part

> (a) Generally. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.
>
> (b) Argument in Brief. The party must devote a section of its opening brief to the request for the fees or expenses.

The rule requires more than a bald request for attorney fees on appeal. Thweatt v. Hommel, 67 Wash.App. 135, 148, 834 P.2d 1058, rev. denied, 120 Wn.2d 1016, 844 P.2d 436 (1992). Argument and citation to authority are required under the rule to advise us of the appropriate grounds for an award of attorney fees as costs. Austin v. U.S. Bank of Wash., 73 Wn.App. 293, 313, 869 P.2d 404, review denied, 124 Wn.2d 1015, 880 P.2d 1005 (1994).

Here, Merry did nothing more than state a request. She failed to

provide the applicable law that supports her request for an award of fees. Her request should be denied.

ii. Doug should be awarded attorney fees.

This appeal is wholly without merit and frivolous. RCW 4.84.185 provides in relevant part:

> In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense.

Here, Merry has filed this appeal, arguing she was under duress and the CR2(a) agreement is invalid, while also demanding that it be enforced. Doug has incurred substantial attorney fees to defend against this appeal, while Merry, an attorney, has represented herself. Doug should be granted reasonable attorney fees for having to defend against this action.

D. CONCLUSION.

For the foregoing reasons, Doug respectfully requests this Court deny Merry's appeal and award Doug attorney fees for this frivolous appeal.

DATED: January 25, 2013.

TUELL & YOUNG, P.S.

SOPHIA M. PALMER, WSBA No. 37799

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1.25.13
Date Signature

TUELL & YOUNG, P.S.

January 25, 2013 - 11:08 AM

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